

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )

Carriage of the Transmissions )  
of Digital Television Broadcast Stations )

CS Docket No. 98-120

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FEDERAL COMMUNICATIONS COMMISSION  
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**Comments of Ovation, Inc.**

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October 13, 1998

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To the Commission:

**Comments of Ovation, Inc.**

Ovation, pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submits comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.

On July 10, 1998, the Commission released its *Notice of Proposed Rulemaking*, seeking comment on whether to implement must carry rules for digital broadcast transmissions. <sup>1/</sup> The *Notice* sought comments on the legal and technical issues relating to digital must carry, and set out seven alternative proposals for must carry, including, an "Immediate Carriage Proposal" (must carry rights vest immediately for all digital broadcasters); a "System Upgrade Proposal" (digital broadcast signals would have first priority for carriage as cable systems add capacity); a "Phase-In Proposal" (which would require digital must carry on 3 to 5

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<sup>1/</sup> *Carriage of the Transmissions of Digital Television Broadcast Stations*, FCC 98-153, CS Docket No. 98-120 (rel. July 10, 1998) (the "*Notice*" or "*NPRM*").

new channels per year); an “Equipment Penetration Proposal” (which would impose must carry rights when a specified percentage of viewers have digital receivers); an “Either-Or Proposal” (which would give the broadcaster the right to demand carriage either for its analog or its digital signal); a “Deferral Proposal” (which would impose digital must carry rights at a later date, such as 2002); and a “No Must Carry Option” (which is self explanatory). As an emerging programming network, Ovation is concerned that any form of digital must carry requirement would seriously jeopardize its ability to initiate service in U.S. television households. Accordingly, we strongly endorse the “No Must Carry Option.”

### **Background – Ovation**

Ovation, an arts cable network, has been seeking to initiate programming service since 1994. Although it is difficult to launch any new programming service, Ovation was initially impeded by cable television regulations that were first adopted in 1993, including analog must carry and cable rate regulations. Analog must carry rules were narrowly upheld against a constitutional challenge in 1997.<sup>2/</sup> With respect to rate regulations, however, the Commission agreed that its rules had inadvertently stifled the development of new networks and

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<sup>2/</sup> *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174 (1997) (“*Turner II*”). The decision in *Turner II* does not necessarily mean that digital must carry requirements would also be constitutional, as the Commission acknowledged. See *Notice* at ¶ 15 (“Noting that *Turner II* did not address the mandatory carriage of the broadcaster’s digital television signal, we ask how the Court’s reasoning and conclusions would apply in the context of this proceeding.”).

that the public interest would be served by reducing such impediments. <sup>3/</sup> It has applied this same concept of the public interest in subsequent proceedings. <sup>4/</sup>

After overcoming early roadblocks, including many caused by the unanticipated consequences of regulation, Ovation was launched on April 21, 1996 to an estimated 400,000 households. Today, Ovation passes approximately 7.5 million households. By the end of 1998, Ovation is expected to reach 10 million households. The network gives viewers unprecedented access to performances of jazz, classical music, ballet, modern dance, opera, and drama; architectural landmarks and important exhibitions; and the inspired vision of artists, musicians and writers. Showcasing the finest in the visual and performing arts from across the country and around the world, Ovation features performance and documentary style programming, including occasional live telecasts of operas, dramas and musical performances.

The strength and originality of this programming has been recognized with international industry accolades; first, with a 1997 CableACE Award, Performing Arts Special for the Ovation original production *Leonard Bernstein's*

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<sup>3/</sup> E.g., *Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd 1226, ¶¶ 8, 64 (1995) (revising rate regulations “[b]ecause appropriate incentives for adding new channels serves the statutory goal of ‘promot[ing] the availability to the public of a diversity of views and information’” and finding that such rules “benefit consumers by assuring that operators will have incentives to add new services”).

<sup>4/</sup> *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, FCC 97-27, ¶¶ 29-31 (Feb. 4, 1997) (leased access channel rates set in a way designed to promote the “growth and continued development of cable systems,” and to avoid “requiring the operator to bump existing programming”).

*New York*, and then 1997 and 1998 Banff Rockie Awards for Best Performance Special, for *Theodora and Richard II*, respectively, and also a 1998 International film and Video Festival Certificate for Creative Excellence for the Ovation co-production, *Monet and the Mediterranean*.”

As further testament to Ovation’s commitment to diversity in its programming, the National Association of Minorities in Cable awarded the network its 1998 Vision Award, Best Music and Variety Program, for Ovation’s *Chico Hamilton: Dancing to a Different Drummer*.” Ovation’s Cable in the Classroom programming, ArtsZone, and its web site, [www.ovationtv.com](http://www.ovationtv.com), have received high praise from educators and students for complimenting the curriculum in the arts and humanities. In fact, over sixty percent of Ovation’s programming is copyright cleared for use in the schools.

Ovation was created in response to the large and growing national audience for the arts and the increasing public demand for quality television programming. According to a U.S. government study, 71% of all U.S. adults are interested in increased arts participation. <sup>5/</sup> Arts-oriented programming serves the public interest, as demonstrated by the fact that 50% of all adults attended an arts exhibition or performance in 1997, compared to only 41% who attended sporting events during the same period. <sup>6/</sup> The network’s mission is to meet the needs of the

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<sup>5/</sup> *Arts Participation in America*, survey conducted for the National Endowment for the Arts by the U.S. Census Bureau, 1992.

<sup>6/</sup> *Survey of Public Participation in the Arts*, Westat Corporation, 1997.

many viewers who expect more from television by providing programming that will enrich and educate with outstanding arts programming not available anywhere else.

### **Ovation's Comments**

As an emerging programming network, and as a programmer that has battled for survival in the face of adverse regulatory incentives, Ovation is acutely aware of the inevitable consequences of any digital must carry requirement. No matter how a must carry requirement may be characterized, it would have two undeniable effects: (1) it would impose a legal preference for broadcasters to the detriment of all nonbroadcast programmers, 7/ and (2) it would place additional constraints on channel capacity that already is extremely limited, making it difficult (if not impossible) to launch nonbroadcast programming services. 8/ And it would not be the first time. The burdens imposed on cable programming networks would be in addition to those already caused by analog must carry. 9/ These concerns are particularly applicable to programming services, such as Ovation, that

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7/ In any must carry scheme, “[b]roadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) (“*Turner I*”).

8/ The Commission has acknowledged that “cable operators could be required to carry double the amount of television stations, that will eventually carry identical content, while having to drop various and varied cable programming services where channel capacity is limited.” *Notice* at ¶ 39.

9/ See *Turner II*, 117 S. Ct. at 1198-99 (broadcasters occupied 5,880 channels as a result of analog must carry that would have otherwise been available for cable programming networks).

fill a unique niche and are striving to become established. A new digital must carry requirement could mean the difference between success or failure of such services.

Although the Commission clearly sought to “soften the blow” by proposing various forms of digital must carry, the different options would nevertheless have a profound adverse impact on new programming networks. The “Immediate Must Carry” proposal obviously would be the most detrimental option, but the others would also be harmful to Ovation. For example, the “System Upgrade Proposal,” which would give digital broadcast signals first priority for carriage on new channel capacity, would be particularly threatening to emerging programmers who are counting on such added capacity to finally obtain carriage. The “Phase-In Proposal,” which would require digital must carry on 3 to 5 new channels per year, would have the same effect, since new programmers would be the most likely candidates to be sacrificed first. Other options, such as the “Equipment Penetration Proposal” and the “Deferral Proposal” would not reduce the burden, since both simply put off the compliance obligation to a later date -- one certain, the other not. <sup>10/</sup> The only alternative that avoids these adverse effects is the “No Must Carry” option.

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<sup>10/</sup> The “Either-Or Proposal” appears to avoid taking up additional channel capacity, unless powerful network affiliates select must carry for their digital signals for which there would be an extremely small percentage of viewers with the necessary equipment. Cable operators would likely feel compelled to carry the analog signals voluntarily to avoid cutting off broadcast network service to most viewers. In such a scenario, the effect of the “Either-Or Proposal” would be the same as the “Immediate Must Carry” option.

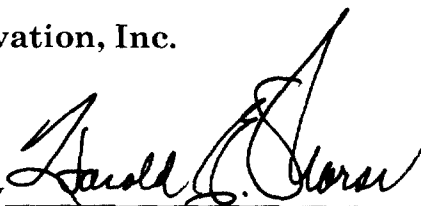
Rules that favor one programmer over another are fundamentally unjust. And, from a public interest perspective, there is absolutely no reason to favor broadcasters, whose programming is already guaranteed space on every cable system. As the Supreme Court has pointed out, it is not true that "broadcast programming is any more 'local' or 'educational' than cable programming." 11/ In the case of a new channel such as Ovation, which has struggled to provide cultural programming that is otherwise unavailable on television, the public interest strongly favors preserving such networks, not sacrificing them.

### Conclusion

For the foregoing reasons, Ovation respectfully requests that the Commission adopt the "No Must Carry" option.

Respectfully submitted,

Ovation, Inc.

By 

Harold E. Morse  
Chief Executive Officer

October 13, 1998

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11/ *Turner I*, 512 U.S. at 648. See also Notice ¶ 16 ("Broadcasting may not be the only source of local programming as cable operators have developed local news channels and public, educational, and governmental access channels, which provide highly localized content, have multiplied in the past six years.").